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NO: 04-6432

IN THE
SUPREME COURT OF THE UNITED STATES

AURELIO O. GONZALEZ,

Petitioner,

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
James Crosby, Secretary,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondent misstates the first question presented, misconstrues the holding of the court of appeals below, ignores the unanimous interpretation of that holding by that court and other circuits, and erroneously claims that petitioner's second question was never a subject of proceedings below (even though it was briefed and is at the core of the en banc court of appeals' holding). In reply, we dispel respondent's restatements, misstatements, and errors. But first, two fundamental points:

- Respondent acknowledges a circuit split on the issue that is the gravamen of the Petition. Resp. Br. at 17-18 (recognizing conflict and citing cases).

- Respondent's failure to substantively contest the Petition's Due Process and Suspension of the Writ contentions implicitly concedes those points, necessarily invoking the Court's doctrine of constitutional avoidance - "[W]hen a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." Harris v. United States, 536 U.S. 545, 555 (2002) (quoting United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)).

I. The Court of Appeals Erred in Holding That Every Rule 60(b) Motion (Other than Fraud under (b)(3)) Constitutes a Prohibited "Second or Successive" Petition as a Matter of Law, in Square Conflict with Decisions of this Court and of Other Circuits.

Rather than respond to the issue as set forth in the Petition and fully acknowledge the evident circuit split, respondent seeks to minimize the split by distorting the Eleventh Circuit's holding below, restating (misstating) the issue presented here as if the Eleventh Circuit's decision

had been simply a case-by-case holding based on given circumstances,[1] and then concluding the decision is a mainstream determination. Respondent's description of the holding is contrary to the majority's black letter decision below, the view of all four dissenting judges, subsequent interpretation of the same court of appeals, and the view of other circuit judges who decided the issue after Gonzalez - all concluding that Gonzalez is a categorical jurisdictional bar to the use of Rule 60(b)(6) in habeas corpus cases, a decision that other circuits identify as being on the outer fringe of a three-way split among the circuits.

The black letter holding of Gonzalez is a categorical jurisdictional prohibition of Rule 60(b) motions in habeas corpus proceedings (except those alleging fraud under 60(b)(3)):

> In conclusion, a Rule 60(b) motion seeking to reopen the judgment in a § 2254 or § 2255 case should be denied by the district court, unless it is filed to correct a clerical mistake (meaning it is really a 60(a) motion) or is filed pursuant to Rule 60(b)(3) to remedy a fraud agents of the government perpetrated on the federal court.

Gonzalez, 366 F.3d at 1285-86. This categorical preclusion affirmed the district court's order that it was without jurisdiction to entertain Mr. Gonzalez's Rule 60(b)(6) motion. 366 F.3d at 1261; R1:34.

Judges Tjoflat, Barkett and Wilson joined in a dissent that described the majority's holding as a categorical jurisdictional bar:

> Today, the majority today [sic] holds that with the exception of the ground provided by Rule 60(b)(3) the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, precludes the district

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[1] Respondent "restated" the issue as, "Whether the United States Court of Appeals for the Eleventh Circuit properly determined that under certain circumstances an attempt to reopen a federal habeas petition finally decided on the merits constitutes a successive petition and is subject to the requirements of 28 U.S.C. § 2244(b). Resp. Br. at i (emphasis added).

> courts of the Eleventh Circuit from entertaining Rule 60(b) motions filed by prisoners who seek the vacation of the district court's judgment denying them habeas relief.

366 F.3d at 1287, 1310 (footnote omitted). In a separate dissenting opinion, Chief Judge Edmondson characterized the holding as a "sharp-edged formulation ... of Rule 60," 366 F.3d at 1286, noting that the majority's categorical jurisdictional approach dispenses with case-by-case analysis: "It might be easier because this approach seems to require less deliberate study of the pertinent motion - study to determine accurately not just the name of the pertinent motion, but the function of the motion ...." Id. But Judge Edmondson rightly rejected the majority's categorical jurisdictional rule because "federal judges are not the rightful makers of policy in this sphere. And we cannot properly favor what is convenient over what is true." Id. These latter comments, in particular, belie respondent's position that the holding below is a routine case-by-case determination, based upon the circumstances presented in Mr. Gonzalez's motion.

Three months after Gonzalez was decided - indeed after the Petition was filed herein - a panel of the Eleventh Circuit Court of Appeals relied on Gonzalez in another habeas corpus case, Boone v. Sec'y, Dep't of Corrs., 371 F.3d 1317 (11th Cir. 2004) (vacated), to sua sponte affirm the dismissal of a Rule 60(b) motion based on the jurisdictional bar erected in the en banc Gonzalez decision:

> We cannot reach these questions because the district court never had jurisdiction to entertain the rule 60(b) motion. We are obligated to raise questions concerning our subject matter jurisdiction sua sponte in all cases. ... Pursuant to this Court's en banc decision in Gonzalez v. Sec'y for the Dep't of Corrs., the law surrounding Rule 60(b) motions has now been clarified. ... Sitting en banc, our Court ... held that district courts do not have the jurisdiction to consider Rule 60(b) motions to reconsider the denial of a habeas petition unless the motion is a 60(b)(3) motion, that is, one made to prevent fraud upon the court.

Boone v. Sec'y, Dep't of Corrs., 377 F.3d 1315 (11th Cir. 2004) (on rehearing granted).

Other circuits have likewise viewed Gonzalez as imposing a categorical jurisdictional bar, not a case-by-case, or circumstances-based, determination. Most recently, in the Sixth Circuit's en banc decision in In re Abdur'Rahman, No. 02-6547/6548, slip op. at 4 (6th Cir. Dec. 13, 2004) (en banc), available at http://pacer.ca6.uscourts.gov/opinions.pdf/ 04a0428p-06.pdf,[2] both the majority and dissenting judges characterized the Eleventh Circuit's Gonzalez decision as a categorical approach. In describing the three-way split among the circuits, the majority wrote:

> At the other end of the spectrum, several courts of appeals, as well as the dissent in our case, have concluded that a Rule 60(b) motion in a habeas case must always - or almost always - be treated as a second or successive petition pursuant to AEDPA. See, e.g., Gonzalez v. Sec'y for Dep't of Corrs., 366 F.3d 1253 (11th Cir. 2004) (en banc) (holding that Rule 60(b) motions must always be treated as a second or successive habeas petitions except where the final judgment is recalled or reopened to correct clerical errors in the judgment itself or where there has been fraud upon the federal court which led to the denial of the habeas petition) ....

Id. at 4. The Abdur'Rahman majority rejected the "categorical" and "rigid approach, adopted by the Eleventh Circuit ...." Id. (Cole, J., Martin, Daughtrey, Moore, Clay, Gilman and Gibbons, JJ., joining). The Abdur'Rahman dissent, on the other hand, embraced the Eleventh Circuit's bright-line jurisdictional bar:

> Of particular relevance is the Eleventh Circuit's recent decision in Gonzalez ... (recognizing two narrow exceptions - for clerical errors and fraud - to the rule that a Rule 60(b) motion is "second or successive" and noting that "[a]n error of law, even one demonstrated by an intervening decision, does not fit either ... exception[]").

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[2] As of December 29, 2004, the Westlaw version of the decision incorrectly identifies the split of the en banc court as 12-1, with only Judge Siler dissenting. 2004 WL 2847749 at *11. The en banc court split 7-6, as indicated in the original slip decision, available at http://pacer.ca6.uscourts.gov/opinions.pdf/04a0428p-06.pdf.

Id. at 11, 14-15 (Siler, J., dissenting, Boggs, C.J., Batchelder, Rogers, Sutton, and Cook, JJ., joining). Although they disagreed about what the Sixth Circuit rule should be, every Sixth Circuit judge agreed that the Eleventh Circuit's Gonzalez decision sets forth a categorical rule that prohibits 60(b)(6) motions in habeas corpus cases. The Sixth Circuit's understanding of the Gonzalez holding is also consistent with other circuits' view of earlier Eleventh Circuit precedent. Harris v. United States, 367 F.3d 74, 79 & n.3 (2d Cir. 2004) (including the Eleventh Circuit among the three circuits that hold that, "regardless of the substance of its allegations, such a motion is always 'a second or successive' habeas petition under AEDPA"); Pridgen v. Shannon, 380 F.3d 721, 725 (3rd Cir. 2004) (same), pet. for cert. filed (U.S. Oct. 29, 2004) (No. 04-7060).

Not only does respondent misconstrue the Gonzalez holding below, but he attempts to do the same to the categorical jurisdictional approach taken by the Tenth Circuit and formerly taken by the Sixth Circuit. Attempting to minimize the circuit conflict, respondent argues that it is an "overstatement to characterize" the Tenth Circuit's decision in Lopez v. Douglas, 141 F.3d 974 (10th Cir. 1998), as holding that a Rule 60(b) motion is always a successive petition, Resp. Br. at 11, but this runs counter to the Tenth Circuit's own interpretation of Lopez. See United States v. Brown, 7 Fed. Appx. 825, 828 (10th Cir. 2001) (unpublished) ("This court has stated that, in keeping with the requirements of AEDPA, a motion pursuant to Federal Rule of Criminal Procedure 60(b) which follows the dismissal of a 28 U.S.C. § 2254 petition must be treated as a successive habeas petition" (citing Lopez) and "a district court lacks jurisdiction to hear a petitioner's successive habeas petition"); United States v. Sternberg, 5 Fed. Appx. 806, 808 (10th Cir. 2001) (unpublished) (same); Lucky v. Ward, 232 F.3d 901 (table), 2000 WL 1678399 (10th

Cir. 2000) (same, as to Rule 60(b)(6)); Jackson v. Champion, 166 F.3d 1221 (table), 1998 WL 792069 (10th Cir. 1998) (same). Respondent also contends that the Sixth Circuit's original precedent in McQueen v. Scroggy, 99 F.3d 1302 (6th Cir. 1996), was not a categorical bar of 60(b) motions, Resp. Br. at 10-11, yet the Sixth Circuit itself considered McQueen a categorical bar, slip op. at 4, 6, an approach it rejected when it expressly overruled McQueen, en banc. Id. at 6.[3]

When the Gonzalez and Lopez holdings are correctly described, the three-way split among the circuits is evident and irrebuttable. One circuit holds that Rule 60(b)(6) motions are never successive. Rodriguez v. Mitchell, 252 F.3d 191, 198 (2d. Cir. 2001). Two circuits take a categorical approach holding that they are always successive and must be dismissed. Gonzalez v. Sec'y for Dep't of Corrs., 366 F.3d 1253 (11th Cir. 2004) (en banc); Lopez v. Douglas, 141 F.3d 974, 975 (10th Cir. 1998). The remaining eight circuits take a middle ground – a functional approach – examining the substance of each individual Rule 60(b) motion to determine if it is properly filed or merely a successive petition in disguise.[4]

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[3] Until recently, the Sixth Circuit was also aligned with the categorical approach of the Tenth and Eleventh Circuits. But two weeks ago, the en banc Sixth Circuit overruled its precedent, McQueen v. Scroggy, 99 F.3d 1302 (6th Cir. 1996), "eschew[ing] both extremes and align[ing] ourselves with those courts that use a functional approach to determine when a district court may entertain a Rule 60(b) motion filed by a prisoner who seeks to vacate a district court's judgment denying him habeas relief." In re Abdur'Rahman, No. 02-6547/6548, slip op. at 2, 4-6 (6th Cir. Dec. 13, 2004) (en banc).

[4] Rodwell v. Pepe, 324 F.3d 66, 70-71 (1st Cir.), cert. denied 124 S. Ct. 224 (2003) (holding that Rule 60(b) motion is available when it "deals primarily with some irregularity or procedural defect" of the habeas proceeding itself); Pridgen v. Shannon, 380 F.3d 721, 725 (3rd Cir. 2004) (holding that where factual predicate of Rule 60(b) motion attacks manner in which earlier habeas judgment was procured, it is not successive and is cognizable), pet. for cert. filed (U.S. Oct. 29, 2004) (No. 04-7060); Reid v. Angelone, 369 F.3d 363, 375 (4th Cir. 2004)

A. The Court Should Grant Certiorari to Resolve the Significant and Continuing Split Among the Circuits, Left Unanswered by Abdur'Rahman v. Bell, 537 U.S. 88 (2002), Over the Jurisdiction of District Courts to Entertain Fed. R. Civ. P. 60(b) Motions in Habeas Corpus Cases.

Acknowledging a circuit split, respondent nevertheless attempts to minimize it, Resp. Br. at 17-18, even though the divide between the circuits is greater today than when the Court granted certiorari in Abdur'Rahman v. Bell, 535 U.S. 1016 (2002), and when it later dismissed it due to procedural difficulties unique to that case. See Abdur'Rahman v. Bell, 537 U.S. 88 (2002) (STEVENS, J., dissenting). This is true even though the Sixth Circuit has since abandoned its extreme categorical approach to join the functional approach followed in most circuits.

When the Petition was filed herein, the three-way split among the circuits counted the Sixth

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(vacating order denying mixed Rule 60(b) motion including both successive and true issues, permitting petitioner to elect to proceed only on 04-7060) true 60(b)(6) issue); United States v. Weinstock, 340 F.3d 200, 206-07 (4th Cir.), cert. denied, 124 S. Ct. 496 (2003) (holding that not all Rule 60(b) motions are successive applications; each case should be analyzed based on the nature of the claims presented); Hess v. Cockrell, 281 F.3d 212, 215 (5th Cir.2002) (taking a dim view of using a Rule 60(b) motion to set aside the denial of habeas, but expressly declining to decide whether such Rule 60(b) motions are always successive habeas petitions); In re Abdur' Rahman, No. 02-6547/ 6548, slip op. at 4-6 (6th Cir. Dec. 13, 2004) (en banc) (expressly rejecting categorical approach of Gonzalez in favor of functional case-by-case analysis); Dunlap v. Litscher, 301 F.3d 873, 876 (7th Cir. 2002) (allowing Rule 60(b) motion to reopen previous habeas case as long as the substance of the motion does not pertain to "territory occupied by AEDPA"), cert. denied sub nom., Lanzotti v. United States, 537 U.S. 1140 (2003), cert. denied sub nom., Hunt v. United States, 537 U.S. 1234 (2003), cert. denied sub nom., Dunlap v. Frank, 123 S. Ct. 2644 (2003); Boyd v. United States, 304 F.3d 813, 814 (8th Cir. 2002) (per curiam) (directing district courts to conduct "a brief initial inquiry to determine whether the allegations in the Rule 60(b) motion in fact amount to a second or successive collateral attack" in which case the motion should be denied as barred or transferred to the court of appeals for certification); Hamilton v. Newland, 374 F.3d 822 (9th Cir. 2004) (holding district court should have treated habeas petitioner's motion solely as a 60(b)(6) motion and not as a second or successive petition under AEDPA); Thompson v. Calderon, 151 F.3d 918, 921 & n.3 (9th Cir.1998) (en banc) (holding that a Rule 60(b) motion ordinarily "should be treated as a successive habeas petition," but declining to adopt "a bright line rule equating all Rule 60(b) motions with successive habeas petitions").

with the Tenth and Eleventh circuits, a position since repudiated in In re Abdur'Rahman, No. 02-6547/6548, slip op. at 4-6 (6th Cir. Dec. 13, 2004) (en banc). Despite its decision, the Sixth Circuit majority recounted the continuing three-way split among the circuits and the continuing criticism that the majority of circuits level at the holdings of the three fringe circuits:

> The courts of appeals that have heretofore grappled with this question have provided divergent answers. The Second Circuit seems to be the only court of appeals to have ruled categorically that a motion pursuant to Rule 60(b), brought after a district court's ruling on an initial habeas petition, is not a second or successive habeas petition, and that such motions should always be treated as any other motion pursuant to Rule 60(b). Rodriguez v. Mitchell, 252 F.3d 191, 198 (2d Cir. 2001).
>
> At the other end of the spectrum, several courts of appeals, as well as the dissent in our case, have concluded that a Rule 60(b) motion in a habeas case must always – or almost always – be treated as a second or successive habeas petition pursuant to AEDPA. See, e.g., Gonzalez v. Sec'y for Dep't of Corrs., 366 F.3d 1253 (11th Cir. 2004) (en banc) (holding that Rule 60(b) motions must always be treated as second or successive habeas petitions except where the final judgment is recalled or reopened to correct clerical errors in the judgment itself or where there was fraud upon the federal court which led to the denial of the habeas petition); Lopez v. Douglas, 141 F.3d 974, 975 (10th Cir.1998) (holding that the successive petition restrictions contained in 28 U.S.C. § 2244(b) apply to Rule 60(b) motions). ... According to the Eleventh Circuit, which is the leading proponent of this view, permitting Rule 60(b) to operate as it customarily does would allow prisoners to circumvent AEDPA's restrictions on second and successive habeas petitions in federal courts. Gonzalez, 366 F.3d at 1256 ("One of the most popular vehicles used in the attempted end-runs [around AEDPA] is a Fed.R.Civ.P. 60(b) motion requesting that the prior judgment denying relief be set aside.").
>
> But neither of the categorical approaches just described is satisfactory. The wholly unrestricted approach taken by the Rodriguez court fails to appreciate the potential for some Rule 60(b) motions to subvert AEDPA's objectives. But the rigid approach, adopted by the Eleventh Circuit and the dissent here, prohibits too much. It fails to appreciate both the significant functional differences between Rule 60(b) motions and habeas petitions and that those differences mean that many Rule 60(b) motions will not run afoul of AEDPA.

In re Abdur'Rahman, No. 02-6547/6548, slip op. at 4

There is no reason to believe, as respondent contends, that the circuits on the far side of the divide will "refine" and "clarif[y]" their approaches to Rule 60(b) in a way that unites them or joins the divide. Resp. Br. at 25. To the contrary, recent decisions of the Tenth and Eleventh circuits (including the en banc decision below) demonstrate that these two outliers are set in their categorical jurisdictional approach. At the other extreme, so is the Second Circuit. Other circuits are equally certain that both extremes are wrong. Unless the Court addresses this division, prisoners in some circuits are jurisdictionally denied access to the Rule 60(b) door to the district courthouse, absent fraud, while prisoners in all other circuits may have their proper motions decided on the merits. This kind of disparity compels Supreme Court review at this time. See SUP. CT. R. 10.

B. The Gonzalez Decision's Bright Line Prohibition of Rule 60(b)(6) Jurisdiction In Habeas Corpus Cases Is Wrong, As Are the Decisions of the Tenth Circuit, in Rejecting the Case-by-Case Jurisdiction Granted by Eight Other Circuit Courts of Appeals.

Respondent argues extensively that the decision below is substantively correct. Nine courts of appeals and the Petition disagree. The Petition stage is not the time to argue the merits further. Coincidentally, however, respondents argument reinforces the cert-worthiness of the Petition. If respondent is correct that the decision below is correct, then nine other circuits are not following the law and are permitting litigation outlawed by AEDPA. Certiorari is just as appropriate under those circumstances.

(1) Applying 28 U.S.C. § 2244(b)(1)'s Successive Application Bar as a Bright Line Prohibition of Rule 60(b)(6) Jurisdiction Is Contrary to the Court's Precedents, Which Carefully Avoid Conflict with the Fifth Amendment's Due Process Clause and the Suspension of the Writ Clause of U.S. Const. art. I sec. 9.

Respondent misrepresents to the Court that the Petition's argument concerning the "procedural due process right to a first federal habeas petition ... was not before the Eleventh Circuit," Resp. Br. at 7 n.9, and that petitioner "did not present the [Suspension of the Writ] argument now made before this Court." Id.[5] Respondent's misrepresentation cannot stand unchallenged. Both issues were before the en banc court of appeals in the form they are presented here. Petitioner presented detailed written argument on both the procedural Due Process and Suspension of the Writ issues, four pages devoted to the Due Process implications of the Eleventh Circuit's proposed holding, Appellant's Letter Br., dated July 10, 2004, at 4-8; three more pages devoted to a discrete Suspension of the Writ claim, id. at 8-10; and a page of summary of both issues. Id. at 3, 13, 15. [6] Indeed, whole segments of the Petition's argument and citations of

[5] Respondent cites, out of context, a footnote in petitioner's initial en banc brief, that distinguishes the procedural Due Process claim from a Suspension of the Writ claim, but fails to advise the Court that later in the briefing petitioner detailed a separate Suspension of the Writ argument. See infra at 10 n.6.

[6] En banc briefing before the court of appeals came in two stages. Initially, the court asked the parties to brief the answers to four questions. Later, on June 10, 2003, the court asked the parties to file a letter brief answering two supplemental questions, which would signal the eventual decision: "(1) Should the general principles of habeas cases and AEDPA 'inform' the decision whether Rule 60(b) relief is available post-AEDPA?; and (2) Except in cases of fraud on the federal habeas court, is Rule 60(b) relief available only 'to avoid miscarriage of justice as defined by our habeas corpus jurisprudence?'" Court of Appeals' Letter, dated June 27, 2003. Petitioner timely filed his Letter Brief on July 10, 2003, Appendix A-12 (attached), commencing his response to the supplemental questions with the preface. "As explained more fully below, the answers to both questions are constrained by at least two constitutional limitations, as well as the substantial differences between Calderon v. Thompson, 523 U.S. 538 (1998), and the present case." Appellant's Letter Br. at 1. This was followed by a summary of the argument:

> We advance, in turn, three responses to this Court's first question: (a) The Due Process Clause of the Fifth Amendment prohibits any interpretation of Rule 60(b)(6) that deprives Mr. Gonzalez of his entitlement to a timely filed first federal habeas corpus proceeding; (b) Applying 28 U.S.C. § 2244(b)(1) to inform the

authority are verbatim the arguments and citations of authority made below. Compare Petition 17-22, 27-34 with Appellant's Letter Br. at 3-10, 13, 15.

To the extent respondent failed to respond to the substance of these constitutional barriers to the Eleventh Circuit's interpretation of AEDPA, respondent implicitly concedes the necessity of invoking the Court's doctrine of constitutional avoidance, "[W]hen a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." Harris v. United States, 536 U.S. 545, 555 (2002) (quoting United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)).

(2) The Eleventh Circuit's Bright Line Prohibition of Rule 60(b) Jurisdiction Erroneously Replaces the Rule 60(b) Standard for Relief With a Formulation Developed in the Inapposite Decision of Calderon v. Thompson

Respondent defends the substance of the Eleventh Circuit's decision and its strained

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interpretation of Rule 60(b)(6) in a way that prohibits Rule 60(b)(6) motions as successive habeas petitions, is unconstitutional under the Suspension of the Writ Clause of U.S. Const. art. I sec. 9; and (c) Calderon v. Thompson is inapposite to Mr. Gonzalez's case, both in substance and procedure, making it an inappropriate candidate from which to borrow jurisprudence with which to decide the present case.

Appellant's Letter Br. at 3. This in turn, was followed by argument on each of the three points, with citations of authority. The Due Process claim was set forth at pages 4-8 of the Letter Brief. A discrete Suspension of the Writ argument was made at pages 8-10. The same two arguments were incorporated by reference in answer to the second question, as well, id. at 13, and were summarized in the concluding paragraph. Id. at 15. It is difficult to think respondent merely overlooked all of this briefing since he responded in writing to both the Due Process and Suspension of the Writ arguments in Appellee's Letter Br., filed July 22, 2003, at 7-11. In short, it is just plain wrong to suggest, as respondent has, that the issues were not presented to, and were not before, the court below.

application of the Court's decision in Calderon v. Thompson, 523 U.S. 538 (1998). Yet Respondent misses the salient point at this stage of certiorari proceedings: No other circuit has adopted a similar formulation or interpretation of Calderon, even though nine other circuits have held, post-Calderon, that Rule 60(b) motions are jurisdictionally permitted in habeas corpus cases. See supra at 6-7 n.4.

II. A Court of Appeals Abuses its Discretion in Refusing to Permit Consideration of a Vital Intervening Legal Development When the Failure to Do So Precludes a Habeas Petitioner from Ever Receiving Any Adjudication on His Claims on the Merits.

Respondent contends that the Petition's second question was not before the court of appeals below, so it should not be considered here. Resp. Br. at 7 n.9. From the title, to the subtitles, to the argument and citations of authority, the Petition's second question was certainly before the court below.

The second question presented involves the abuse of discretion flowing from refusal to allow reopening of a habeas proceeding to consider intervening legal authority in a case improperly dismissed without an adjudication of the prisoner's claims. Both parties identified "abuse of discretion" as the standard of review in the court of appeals and petitioner argued abuse of discretion in his written briefing and oral argument below. Appellant's Initial En Banc Br. at 6, 50-54; Appellee's En Banc Br. at 7; Appellant's En Banc Reply Br. at 21-27. Indeed, the title of issue 4 of petitioner's initial brief was: "It was an abuse of discretion for the district court to deny the Rule 60(b) motion in this case." Appellant's Initial En Banc Br. at iii. This was followed by argument and citations of authority, concluding that it is an abuse of discretion when the decision to deny a Rule 60(b) motion rests on an errant conclusion of law. Id. at 50-53. And, as indicated supra at 10-11 n.6, the argument was extended in supplemental briefing ordered by the

court of appeals. The court of appeals acknowledged that it asked the parties to brief and argue the abuse-of-discretion issue. Gonzalez, 366 F.3d at 1256. The majority decision of the court of appeals pretermits the answer, ruling instead that a jurisdictional bar prevents a Rule 60(b)(6) motion from being heard at all, id. at 1281-82, 1285-86, but the issue was certainly before the court.[7]

A. The Due Process Clause of the Fifth Amendment Prohibits Any Interpretation of Rule 60(b)(6) That Deprives a Habeas Petitioner of His Entitlement to a Timely Filed First Federal Habeas Corpus Proceeding.

B. The Eleventh Circuit's Bright Line Rule Interpreting AEDPA as Repealing, Sub Silentio, Rule 60(b)(6) in Habeas Corpus Cases Violates The Suspension of the Writ Clause of U.S. Const. art. I sec. 9

As observed earlier, respondent misrepresents to the Court that the Petition's argument concerning the "procedural due process right to a first federal habeas petition ... was not before the Eleventh Circuit," Resp. Br. at 7 n.9, and that petitioner "did not present the [Suspension of the Writ] argument now made before this Court." Id. Respondent's claim is simply not true, as is explained in detail supra at 10-11 n.6. To the extent respondent ignored these two constitutional barriers to the Eleventh Circuit's decision, respondent necessarily concedes them, completely undermining the correctness of the decision below.

Attempting to cabin the Rule 60(b) question within procedural default law, respondent claims that the "dismissal" of petitioner's original habeas corpus claim, R1:17, was a merits determination. Resp. Br. at 13-16. In support, respondent relies on a series of inapposite lower

[7] Conforming the title of the question presented in this Court to identify the last court to rule erroneously – the court of appeals – is certainly appropriate after the court of appeals repeats the error of the district court, and as the litigation moves from that level to this Court.

court decisions and Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995). Resp. Br. at 13-14. Plaut holds, in the very different setting of a civil securities fraud case, that an adverse determination resulting from a statute of limitations defense is deemed on the merits such that Congress cannot retroactively compel a court to reopen the case, nor authorize a plaintiff to file a new lawsuit in place of the previously closed litigation. But Plaut's holding does not follow to the context of a habeas corpus case, where the Court has looked to whether a decision was made on the actual claims of the habeas petition to decide if it was dismissed procedurally or on the merits. See, e.g., Slack v. McDaniel, 529 U.S. 473, 488 (2000) (holding that original dismissal was procedural, not on the merits – and therefore new petition was not second or successive – because "'[n]o claim made in Slack's 1991 petition was adjudicated during the three months it was pending in federal court").

In addition, neither Plaut, nor any of the other cited decisions, involves Rule 60(b) or its use in habeas corpus proceedings. It follows, obviously, that they do not prevent the use of Rule 60(b) to reopen a closed habeas corpus case, whether closed on the merits or on procedural grounds. Analysis of Rule 60(b) differs from the analysis in Plaut because in Plaut Congress attempted to direct the courts to reopen closed litigation based on a new law; Rule 60(b), however, was in effect when petitioner's case was first decided and it has traditionally permitted a court to exercise discretion to reopen a closed case for a variety of reasons, including, under 60(b)(6), an intervening decision that undermines how the law originally in effect was interpreted. Gonzalez, 366 F.3d at1289-92 (Tjoflat, J. dissenting, Barkett and Wilson, JJ., joining).

Finally, respondent's Opposition cautions that if certiorari is granted and petitioner prevails, Rule 60(b)(6) may be used as a tool to reopen other closed cases based on other

intervening changes in law. Resp. Br. at 21-22. Two replies: First, Rule 60(b) is already available for this purpose in most circuits. Second, it should be available in all circuits, precisely for such purposes.

Respectfully submitted,

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December 29, 2004

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REPLY APPENDIX

REPLY APPENDIX

Appellant's En Banc Letter Brief, dated July 10, 2003 . . . . . A-12

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July 10, 2003

Thomas K. Kahn, Clerk
United States Court of Appeals for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA. 30303

Re: Case No. 02-12054
Aurelio Gonzalez v. Secretary for the Department of Corrections

Dear Sir:

By letter of June 27, 2003, the Court has posed two supplemental questions: (1) Should the general principles of habeas cases and AEDPA "inform" the decision whether Rule 60(b) relief is available post-AEDPA?; and (2) Except in cases of fraud on the federal habeas court, is Rule 60(b) relief available only "to avoid miscarriage of justice as defined by our habeas corpus jurisprudence?" Implicit in the questions is the concession that AEDPA does not expressly govern Rule 60(b) decisions, a concession with which we agree.

As explained more fully below, the answers to both questions are constrained by at least two constitutional limitations, as well as the substantial

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differences between Calderon v. Thompson, 523 U.S. 538 (1998), and the present case. In addition, the approaches suggested by both questions are inconsistent with the more favorable analytical framework used by the Supreme Court in post-judgment review of habeas corpus cases denied or dismissed on procedural grounds.

(1) To what extent, if any, and how, should the general principles underlying habeas and section 2255 cases guide, and the provisions of AEDPA inform, the decision of whether the grant of Rule 60(b) relief relating to a habeas or section 2255 judgment is available, and if available, is an abuse of discretion?

Rule 60(b) has six grounds for relief, fortified with an extensive body of jurisprudence of its own. See APPELLANT'S INITIAL EN BANC BRIEF, at 32, citing Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d §§ 2851-2873; 28 U.S.C.A. Fed. R. Civ. P. 57-60. The rule derives from the common-law and inherent powers of a court, but was codified in a rule-making process involving the Supreme Court and Congress. According to the rule and the many cases interpreting it, Rule 60(b) relief is granted in the discretion of the district court, based upon one of the six enumerated grounds and exceptional circumstances.

The authority of an appellate court to recall its mandate, on the other hand, is debatable, 523 U.S. at 549, and is not codified by statute or rule. To the extent it is recognized at all, it is a remedy "of last resort, held in reserve against grave, unforseen contingencies." Id. Due to a paucity of rules or jurisprudence of its own,

the authority to recall an appellate mandate must necessarily be informed by other rules and law. Id.

There is no reason, however, for Rule 60(b) determinations to be informed by anything more than its own well-developed jurisprudence, since it has broad explication in caselaw, both before its codification, and after. This is especially so to the extent that the alternative sources of jurisprudence proposed to "inform" the 60(b) decision conflict with the 60(b) body of law, and invite significant constitutional violations under the Due Process Clause of the Fifth Amendment and the Suspension of the Writ Clause of U.S. Const. art. I sec. 9. The potential constitutional violations prohibit such an application of AEDPA or informing a Rule 60(b) decision based on AEDPA.

We advance, in turn, three responses to this Court's first question: (a) The Due Process Clause of the Fifth Amendment prohibits any interpretation of Rule 60(b)(6) that deprives Mr. Gonzalez of his entitlement to a timely filed first federal habeas corpus proceeding; (b) Applying 28 U.S.C. § 2244(b)(1) to inform the interpretation of Rule 60(b)(6) in a way that prohibits Rule 60(b)(6) motions as successive habeas petitions, is unconstitutional under the Suspension of the Writ Clause of U.S. Const. art. I sec. 9; and (c) Calderon v. Thompson is inapposite to Mr. Gonzalez's case, both in substance and procedure, making it an inappropriate

candidate from which to borrow jurisprudence with which to decide the present case.

(a) The Due Process Clause of the Fifth Amendment prohibits any interpretation of Rule 60(b)(6) that deprives Mr. Gonzalez of his entitlement to a timely filed first federal habeas corpus proceeding.

Mr. Gonzalez has a statutory right to a single federal habeas corpus review of his state imprisonment. 28 U.S.C. § 2254. Denial of that right violates procedural due process. See INITIAL EN BANC BRIEF OF APPELLANT, at 27-31. Mr. Gonzalez filed a timely federal habeas corpus petition, raising claims of facial merit, which, under the law of this Circuit, constitute grounds for granting of the Writ. See INITIAL EN BANC BRIEF OF APPELLANT, at 21-23. His timely habeas corpus petition was aborted by AEDPA's limitations period (as misconstrued by the district court). He was deprived of any appeal of that error due to AEDPA's gatekeeping certificate of appealability requirement (decided pre-Slack v. McDaniel, 529 U.S. 473 (2000), when this Court still required a constitutional issue for issuance of a COA, even for procedural dismissals).

The combination of AEDPA legislation and erroneous court rulings deprived Mr. Gonzalez of habeas review to which he was entitled and appellate review to correct that error, ultimately effecting an arbitrary and complete denial of the statutory right of habeas corpus review, denying the most basic precepts of procedural due process. Now that the Supreme Court and this Court have corrected

the legal interpretation of the previously misconstrued AEDPA limitations period, in Artuz v. Bennett, 531 U.S. 4 (2000), and Delancy v. Florida Department of Corrections, 246 F.3d 1328 (11th Cir. 2001), Rule 60(b)(6) is the only available procedural device to prevent injustice and remedy the due process violation. To permit another provision of AEDPA - or the spirit of AEDPA - to inform the interpretation of Rule 60(b) to effectively repeal sub silentio Rule 60(b)'s use in this case is but a further violation of procedural due process.

Allowing AEDPA to have such deleterious effect is inconsistent with the approach taken by the Supreme Court in other cases where AEDPA threatened constitutional conflict. Good illustrations of this are Slack v. McDaniel, 529 U.S. 473, and Felker v. Turpin, 518 U.S. 651 (1996). In Slack, for example, the Supreme Court refused to allow the specific language of AEDPA - "§ 2253(c)'s requirement that a COA may issue only upon the 'substantial showing of the denial of a constitutional right'" - to prevent appeal of dismissals based on purely procedural grounds. The state in Slack had pointed to the apparently-plain language of AEDPA, but the Court rejected that approach, balancing AEDPA's harsh result against the importance of correctly decided habeas corpus proceedings:

> According to the State, only constitutional rulings may be appealed. Under this view, a state prisoner who can demonstrate he was convicted in violation of the Constitution and who can demonstrate that the district court was wrong to dismiss the petition on procedural

> grounds would be denied relief. We reject this interpretation. The writ of habeas corpus plays a vital role in protecting constitutional rights. In setting forth the preconditions for issuance of a COA under § 2253(c), Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal.
>
> Our conclusion follows from AEDPA's present provisions, which incorporate earlier habeas corpus principles.

529 U.S. at 483. Faced with a constitutional collision between AEDPA and the procedural due process right of habeas review, the Court chose to avoid the collision by interpreting the statute's limitations to fit within what the Constitution permits, allowing a COA for procedural dismissals, without the need to demonstrate an appellate issue of constitutional dimension. Where the apparent language of AEDPA leads to an unconstitutional result, the Court looked instead to the earlier habeas corpus jurisprudence incorporated in the statute.

This same approach drove the Court's decision in Felker v. Turpin. Rather than interpret AEDPA's apparently-plain language prohibiting Supreme Court jurisdiction to violate the Exceptions Clause of Art. III, § 2, or the Suspension Clause of Art. I, § 9 of the Constitution, the Court read the law to "not preclude this Court from entertaining an application for habeas corpus relief ... thereby obviat[ing] any claim by petitioner under the Exceptions Clause ... and ... the Suspension Clause... ." 518 U.S. 654. Its decision relied in large part upon Congressional silence about the fate of prior habeas corpus jurisprudence, despite

an express statutory directive:

> [W]e conclude that Title I of the Act has not repealed our authority to entertain original habeas petitions, for reasons similar to those stated in [Ex parte] Yerger, 8 Wall. 85, 19 L.Ed. 332 (1869). No provision of Title I mentions our authority to entertain original habeas petitions; in contrast, § 103 amends the Federal Rules of Appellate Procedure to bar consideration of original habeas petitions in the courts of appeals. Although § 2244(b)(3)(E) precludes us from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court, it makes no mention of our authority to hear habeas petitions filed as original matters in this Court. As we declined to find a repeal of § 14 of the Judiciary Act of 1789 as applied to this Court by implication then, we decline to find a similar repeal of § 2241 of Title 28–its descendant–by implication now.

518 U.S. 660-61 (footnotes omitted). As in Slack, Felker avoided constitutional collision by refusing to imply prohibitions in AEPDA that the Constitution does not tolerate. Interpreting AEDPA to fit within the Constitution, rather than interpreting it at face value, is the accepted approach. And it is equally appropriate here, constraining the extent to which AEDPA may influence or inform this Court's en banc determination.[1]

Much as the Supreme Court used Congressional silence as a reason for assuming AEDPA did not repeal prior habeas corpus jurisprudence, this Court must

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[1] See generally Note, The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions, 111 Harv. L. Rev. 1578 (April 1998) (summarizing the courts' consistently liberal interpretation of the AEDPA to avoid constitutional difficulties).

do the same, not permitting Rule 60(b) jurisprudence in habeas corpus cases to be altered by Congressional silence on the 60(b) procedure.

(b) Applying 28 U.S.C. § 2244(b)(1) to inform the interpretation of Rule 60(b)(6) in a way that prohibits Rule 60(b)(6) motions as successive habeas petitions is unconstitutional under the Suspension of the Writ Clause of U.S. Const. art. I sec. 9.

"Prior to the enactment of [AEDPA], a state prisoner could file a same-claim second or successive federal habeas corpus petition (i.e., one raising a claim presented and denied in a prior habeas corpus petition)" where the "'ends of justice' would be served by addressing a claim on the merits," because a "'manifest miscarriage of justice would result if petitioner was not permitted to relitigate a claim." Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 28.4, at 1324-25 (4th ed. 2001). "AEDPA drastically revised prior law" by imposing a "blanket ban on successive litigation, codified in 28 U.S.C. § 2244(b)(1): 'A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.'" Id. Although, the Supreme Court upheld AEDPA's restrictions on new-claim successive petitions (§ 2244(b)**(2)**), "the constitutionality of AEDPA's blanket ban on same-claim petitions [(§ 2244(b)**(1)**)] is less certain." Id. (emphasis added). The reasons given by the Court for upholding § 2244(b)**(2)** simply do not apply to the blanket ban of § 2244(b)**(1)**.

Felker v. Turpin upheld the new-claim successive petition restrictions imposed by 28 U.S.C. § 2244(b)**(2)**, which limited new-claim successive petitions to those involving enumerated exceptional circumstances. Hertz & Liebman, Federal Habeas Corpus Practice and Procedure § 28.4(a), at 1326. Although AEDPA "'further restricted the availability of' such petitions, the Court ruled, it did so via provisions that were 'well within the compass' of 'the complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.'" Hertz & Liebman, supra § 28.4(a), at 1326, quoting Felker, 518 U.S. 664.

Subsection (2) must be contrasted with the blanket prohibition of same-claim successive petitions - an absolute res judicata bar - imposed by § 2244(b)(1). "Because (1) section 2244(b)(1) does not simply 'further[] restrict' new-claim successive petitions, but, instead, forbids them under all circumstances, (2) because doing so works a literal suspension of the writ for such cases, and (3) doing so moves qualitatively beyond 'the compass' of preexisiting 'equitable principles ...[,] historical usage, statutory developments, and judicial decisions,' the same-claim provision poses a serious constitutional issue that Felker did not resolve." Id. The Hertz & Liebman treatise's caution is enhanced by the Supreme Court's reluctance to apply strict rules of res judicata in habeas corpus cases:

> [T]he Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy. This Court has consistently relied on the equitable nature of habeas corpus to preclude strict rules of res judicata. Thus, for example, in Sanders v. United States, 373 U.S. 1 (1963), this Court held that a habeas court must adjudicate even a successive habeas claim when required to do so by the "ends of justice." Id., at 15-17. The Sanders Court applied this equitable principle even to petitions brought under 28 U.S.C. § 2255, though the language of § 2255 contained no reference to an "ends of justice" inquiry. 373 U.S. at 12-15.

Schlup v. Delo, 513 U.S. 298 (1995) (alternate citations omitted).

To the extent that this Court attempts to inform its decision on the Rule 60(b) determination below by inferring as applicable § 2244(b)(1)'s blanket prohibition of same-claim habeas petitions, it suspends the Writ in violation of the Constitution. Such a result is unacceptable. As the Supreme Court demonstrated in Slack and Felker, the proper course is to interpret AEDPA to avoid the unconstitutional result, incorporating instead "earlier habeas principles" that allow the law and Constitution to coexist. In this case, the dictated course prohibits this Court from informing its Rule 60(b) decision by the contrary terms of AEDPA.

(c) Calderon v. Thompson is inapposite to Mr. Gonzalez's case, both in substance and procedure, making it an inappropriate candidate from which to borrow jurisprudence with which to decide the present case.

Calderon v. Thompson involved the propriety of an appellate court recalling its mandate to "revisit the merits of its earlier decision" about a prisoner who

"already had extensive review of his claims in federal and state courts." 523 U.S. at 557. Thompson's "extensive review" included litigation on the merits of his claims in at least six separate proceedings, and a plenary appeal of a merits decision based on a federal habeas corpus evidentiary hearing. 523 U.S. 545-46. Mr. Gonzalez, on the other hand, has never had a hearing, in state or federal court; has never had an evidentiary hearing, in state or federal court; had his first federal habeas petition erroneously dismissed without consideration of the merits of his claims; and was denied an appeal of that error by the restrictions of AEDPA and a misinterpretation of the COA requirement by this Court, pre-Slack v. McDaniel.

The vehicle by which Thompson sought relief, recall of a mandate, is rarely exercised by appellate courts, the authority for the process is questionable, and there are neither rules, statutes, nor a body of jurisprudence by which to judge its use. The Supreme Court was compelled, therefore, to inform its decision by analogous jurisprudence. To the contrary, Mr. Gonzalez's remedy of choice is a common legal procedure, the authority for which is recognized by rule and a rich body of jurisprudence. Determining the proper application of Rule 60(b) can be accomplished through its own jurisprudence, so resort to analogy is unnecessary. Moreover, resort to the analogy of Calderon v. Thompson conflicts with the established principles of Rule 60(b).

Based on the substantive and procedural differences, analogizing Mr. Thompson's case to Mr. Gonzalez's pending appeal is supported neither by logic nor the law.

(2) Except in cases of fraud on the federal habeas court, is Rule 60(b) relief available only "to avoid miscarriage of justice as defined by our habeas corpus jurisprudence?"

Stated differently, the Court's second question asks: Should the Court of Appeals by judicial fiat repeal the provisions of five subsections of Rule 60(b), ignore decades of Rule 60(b) caselaw and jurisprudence, and apply an unrelated miscarriage of justice jurisprudence in place of the extraordinary circumstances test set forth both in Rule 60(b)(6), and the cases interpreting it? One might add: Should the Court of Appeals do this, even though Congress has not uttered a word about Rule 60(b) in this context, and no other court, including the Supreme Court, has ever done so?[2] We answer: "No."

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[2] Indeed, this approach was not even within the matrix of possible alternatives discussed by Justice Stevens in his recitation of issues confronting the Court on the viability of 60(b) in habeas cases. Abdur'Rahman v. Bell, 123 S. Ct. 594 (2003) (Stevens, J., dissenting). That case addressed the same type of issue presented by Mr. Gonzalez, whether "'changes in the legal landscape' ... demonstrated that the District Court's procedural bar ruling rested on a mistaken premise, ... constitut[e] a 'reason justifying relief from the operation of the judgment' within the meaning of Rule 60(b)(6)." Yet the universe of alternative answers set forth by Justice Stevens' dissent, whose goal was to illuminate the many issues posed by the question, fails to so much as mention the idea that the Rule 60(b) standard of relief is now different post-AEDPA.

All of the reasons advanced in our answer to the first question are applicable here as well. And we add several additional reasons.

AEDPA neither requires this Court to abandon the plain language of Rule 60(b) and its caselaw, nor does it require this Court to replace that rule and law with another body of law unrelated to the rule's context. As we have demonstrated from the outset, the Rule 60(b) proceeding is freestanding, merely a means to reopen a judgment, not a part of the original habeas corpus proceeding. See APPELLANT'S INITIAL EN BANC BRIEF, at 10-16, EN BANC REPLY BRIEF, at 18-21; Abdur'Rahman, 123 S. Ct. at 594, 597-98. ("It merely ask[s] the District Court to set aside its 1998 order terminating the habeas corpus proceeding and to decide the merits of the ... claim that had been procedurally barred."). So it makes little sense to apply the habeas corpus standard of relief - miscarriage of justice a/k/a actual innocence - to the Rule 60(b) context, which speaks not to the merits of a habeas claim, but merely whether the merits should be reconsidered. Id. This argument is enhanced here, where Mr. Gonzalez was precluded from demonstrating anything, a miscarriage of justice or anything else, due to the district court's erroneous dismissal of the habeas corpus case before any of the underlying merits were heard.

The posture of Mr. Gonzalez's case suggests that the better case for analogy is Slack v. McDaniel, in which the Supreme Court carved out special considerations

for habeas cases reaching the Court of Appeals after a dismissal on procedural grounds. Despite the express language of AEDPA, the Court chose to treat the COA requirement for procedural dismissals differently than for cases decided on the merits. Recognizing that the alternative left petitioners without habeas review or an appeal of that decision, the Court treated procedurally dismissed cases to a special rule, designed to ensure appellate review even where no constitutional appellate issue is present. It did not adopt the harsh miscarriage of justice approach – permitting review only in cases of actual innocence – but rather it recognized that procedurally dismissed cases have never had a merits determination in which miscarriage of justice could be demonstrated. Weighing the importance of the Writ's role in ensuring justice under our Constitution against an potential abolition of that process for procedurally dismissed cases, the Supreme Court opted in favor of a less demanding, not more demanding, standard.

The difference between Rule 60(b) jurisprudence and the miscarriage of justice jurisprudence is vast. In the former case, a wide variety of grounds other than fraud and actual innocence are cognizable, while in the latter case only actual innocence or fraud are cognizable as grounds for relief. It is implausible that Congress intended to delete five of the six paragraphs of Rule 60(b) without ever saying a word on the subject. One of those grounds for relief includes, as alleged

here, an intervening change (correction) in the interpretation of the law, coupled with exceptional circumstances. It seems logically flawed to say that the same Supreme Court that has taken pains to ensure that erroneous habeas corpus procedural decisions should remain open to review, even if lacking appellate issues of constitutional dimension, intends for its more restrictive miscarriage of justice jurisprudence to inform (override) the specific requisites of Rule 60(b). Moreover, as Mr. Gonzalez's case proves, to do so would violate both the Due Process Clause of the Fifth Amendment and, in a separate context, the Suspension of the Writ Clause of U.S. Const. art. I sec. 9, something the Supreme Court has taken pains to avoid. Lonchar v. Thomas, 517 U.S. 314, 324 (1996)("Dismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty."). As the Supreme Court cautioned in Lonchar, to protect the continuing viability of the Great Writ, lower courts are bound to follow the established law, and are "not authorize[d] ... to ignore this body of statutes, rules and precedents," a caution we reiterate in concluding our response to this Court's supplemental suggestions and questions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was served by U.S Mail this 10th day of July, 2003, upon counsel for appellee, Cassandra K. Dolgin, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, FL 32399-1050; and by e-mail to Cassandra _Dolgin@oag.state.fl.us, and by FEDEX Overnight to the Clerk of the Court of Appeals.

Paul M. Rashkind

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